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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Ryan Morrow,
10 Plaintiff,

11 v.

12 Steven Temple, et al.

13 Defendants.
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No. CV 19-202-TUC-JAS (BGM)

ORDER

15 **DISCUSSION**

16 Pending before the Court is a Report and Recommendation issued by United States
17 Magistrate Judge Macdonald (Doc. 89). Defendants filed objections to the Report and
18 Recommendation.¹

19 As a threshold matter, as to any new evidence, arguments, and issues that were not
20 timely and properly raised before United States Magistrate Judge Macdonald, the Court
21 exercises its discretion to not consider those matters and considers them waived. *United*
22 *States v. Howell*, 231 F.3d 615, 621-623 (9th Cir. 2000) (“[A] district court has discretion,
23 but is not required, to consider evidence presented for the first time in a party's objection
24 to a magistrate judge's recommendation . . . [I]n making a decision on whether to consider
25 newly offered evidence, the district court must . . . exercise its discretion . . . [I]n providing
26 for a *de novo* determination rather than *de novo* hearing, Congress intended to permit
27 whatever reliance a district judge, in the exercise of sound judicial discretion, chose to

28 ¹ Unless otherwise noted by the Court, internal quotes and citations have been omitted
when citing authority throughout this Order.

1 place on a magistrate judge's proposed findings and recommendations . . . The magistrate
2 judge system was designed to alleviate the workload of district courts . . . To require a
3 district court to consider evidence not previously presented to the magistrate judge would
4 effectively nullify the magistrate judge's consideration of the matter and would not help to
5 relieve the workload of the district court. Systemic efficiencies would be frustrated and the
6 magistrate judge's role reduced to that of a mere dress rehearsal if a party were allowed to
7 feint and weave at the initial hearing, and save its knockout punch for the second round . .
8 . Equally important, requiring the district court to hear evidence not previously presented
9 to the magistrate judge might encourage sandbagging. [I]t would be fundamentally unfair
10 to permit a litigant to set its case in motion before the magistrate, wait to see which way
11 the wind was blowing, and—having received an unfavorable recommendation—shift gears
12 before the district judge.”); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1122 (9th Cir.
13 2003) (“Finally, it merits re-emphasis that the underlying purpose of the Federal
14 Magistrates Act is to improve the effective administration of justice.”).

15 Assuming that there has been no waiver, the Court has conducted a *de novo* review
16 as to Defendants’ objections. *See* 28 U.S.C. § 636(b)(1)(C) (“Within fourteen days after
17 being served with [the Report and Recommendation], any party may serve and file written
18 objections to such proposed findings and recommendations as provided by rules of court.
19 A judge of the court shall make a *de novo* determination of those portions of the report or
20 specified proposed findings or recommendations to which objection is made. A judge of
21 the court may accept, reject, or modify, in whole or in part, the findings or
22 recommendations made by the magistrate judge. The judge may also receive further
23 evidence or recommit the matter to the magistrate judge with instructions.”).

24 In addition to reviewing the Report and Recommendation and any objections, the
25 Court’s *de novo* review of the record includes review of the record and authority before
26 United States Magistrate Judge Macdonald which led to the Report and Recommendation
27 in this case.

28 Upon *de novo* review of the record and authority herein, the Court rejects

1 Defendants' objections, and adopts United States Magistrate Judge Macdonald's Report
 2 and Recommendation. *See, e.g., United States v. Rodriguez*, 888 F.2d 519, 522 (7th Cir.
 3 1989) ("Rodriguez is entitled by statute to *de novo* review of the subject. Under *Raddatz*
 4 [447 U.S. 667 (1980)] the court may provide this on the record compiled by the magistrate.
 5 Rodriguez treats adoption of the magistrate's report as a sign that he has not received his
 6 due. Yet we see no reason to infer abdication from adoption. On occasion this court affirms
 7 a judgment on the basis of the district court's opinion. Affirming by adoption does not
 8 imply that we have neglected our duties; it means, rather, that after independent review we
 9 came to the same conclusions as the district judge for the reasons that judge gave, rendering
 10 further explanation otiose. When the district judge, after reviewing the record in the light
 11 of the objections to the report, reaches the magistrate's conclusions for the magistrate's
 12 reasons, it makes sense to adopt the report, sparing everyone another round of paper.");
 13 *Bratcher v. Bray-Doyle Independent School Dist. No. 42 of Stephens County, Okl.*, 8 F.3d
 14 722, 724 (10th Cir. 1993) ("*De novo* review is statutorily and constitutionally required
 15 when written objections to a magistrate's report are timely filed with the district court . . .
 16 The district court's duty in this regard is satisfied only by considering the actual testimony
 17 [or other relevant evidence in the record], and not by merely reviewing the magistrate's
 18 report and recommendations . . . On the other hand, we presume the district court knew of
 19 these requirements, so the express references to *de novo* review in its order must be taken
 20 to mean it properly considered the pertinent portions of the record, absent some clear
 21 indication otherwise . . . Plaintiff contends . . . the district court's [terse] order indicates
 22 the exercise of less than *de novo* review . . . [However,] brevity does not warrant look[ing]
 23 behind a district court's express statement that it engaged in a *de novo* review of the
 24 record."); *Murphy v. International Business Machines Corp.*, 23 F.3d 719, 722 (2nd Cir.
 25 1994) ("We . . . reject Murphy's procedural challenges to the granting of summary
 26 judgment . . . Murphy's contention that the district judge did not properly consider her
 27 objections to the magistrate judge's report . . . lacks merit. The judge's brief order mentioned
 28 that objections had been made and overruled. We do not construe the brevity of the order

as an indication that the objections were not given due consideration, especially in light of the correctness of that report and the evident lack of merit in Murphy's objections."); *Gonzales-Perez v. Harper*, 241 F.3d 633 (8th Cir. 2001) ("When a party timely objects to a magistrate judge's report and recommendation, the district court is required to make a *de novo* review of the record related to the objections, which requires more than merely reviewing the report and recommendation . . . This court presumes that the district court properly performs its review and will affirm the district court's approval of the magistrate's recommendation absent evidence to the contrary . . . The burden is on the challenger to make a *prima facie* case that *de novo* review was not had."); *Brunig v. Clark*, 560 F.3d 292, 295 (5th Cir. 2009) ("Brunig also claims that the district court judge did not review the magistrate's report *de novo* . . . There is no evidence that the district court did not conduct a *de novo* review. Without any evidence to the contrary . . . we will not assume that the district court did not conduct the proper review.").²

CONCLUSION

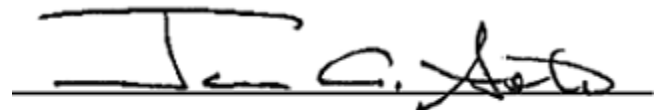
Accordingly, IT IS HEREBY ORDERED as follows:

² See also *Pinkston v. Madry*, 440 F.3d 879, 893-894 (7th Cir. 2006) (the district court's assurance, in a written order, that the court has complied with the *de novo* review requirements of the statute in reviewing the magistrate judge's proposed findings and recommendation is sufficient, in all but the most extraordinary of cases, to resist assault on appeal; emphasizing that "[i]t is clear that Pinkston's argument in this regard is nothing more than a collateral attack on the magistrate's reasoning, masquerading as an assault on the district court's entirely acceptable decision to adopt the magistrate's opinion . . ."); *Garcia v. City of Albuquerque*, 232 F.3d 760 (10th Cir. 2000) ("The district court's order is terse . . . However, neither 28 U.S.C. § 636(b)(1) nor Fed.R.Civ.P. 72(b) requires the district court to make any specific findings; the district court must merely conduct a *de novo* review of the record . . . It is common practice among district judges . . . to [issue a terse order stating that it conducted a *de novo* review as to objections] . . . and adopt the magistrate judges' recommended dispositions when they find that magistrate judges have dealt with the issues fully and accurately and that they could add little of value to that analysis. We cannot interpret the district court's [terse] statement as establishing that it failed to perform the required *de novo* review . . . We hold that although the district court's decision is terse, this is insufficient to demonstrate that the court failed to review the magistrate's recommendation *de novo*"); *Goffman v. Gross*, 59 F.3d 668, 671 (7th Cir. 1995) ("The district court is required to conduct a *de novo* determination of those portions of the magistrate judge's report and recommendations to which objections have been filed. But this *de novo* determination is not the same as a *de novo* hearing . . . [I]f following a review of the record the district court is satisfied with the magistrate judge's findings and recommendations it may in its discretion treat those findings and recommendations as its own.").

1 (1) United States Magistrate Judge Macdonald's Report and Recommendation (Doc.
2 89) is accepted and adopted.

3 (2) Plaintiff's motion for sanctions (Doc. 86) is granted; an adverse inference jury
4 instruction shall be given in this case.

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6 Dated this 23rd day of June, 2022.

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10 Honorable James A. Soto
11 United States District Judge
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